IPREME COURT, U. S.

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# In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 725

RAYMOND PATRIARCA, RONALD J. CASSESSO and HENRY TAMELEO,

PETITIONERS,

*v.*

UNITED STATES OF AMERICA,

RESPONDENT.

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the First Circuit entered in the above-entitled cases on October 14, 1968.

The petitioners file herewith a single petition in accordance with Rule 23 (5), their appeals in the lower court having been heard on a printed consolidated record appendix.[1]

[1] The letters "P.R." refer to Vol. I of petitioners' (appellants below) consolidated record appendix, containing the "Pleadings Record".

The letters "T.T." refer to Vols. II and III, containing the "Trial Transcript".

The letters "E.R." refer to Vol. IV, containing the "Exhibits Record".

## Opinion Below

The opinion of the Court of Appeals for the First Circuit is not yet reported, but is annexed hereto as Appendix A.

## Judgments Below

The judgments of the United States District Court for the District of Massachusetts were entered on April 9, 1968 (P.R. 22) and are printed at P.R. 45-50.

The judgments of the Court of Appeals for the First Circuit were entered on October 14, 1968, and are annexed hereto as Appendix B.

## Jurisdiction

The judgments sought to be reviewed are dated, and were entered, October 14, 1968.

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. 1254 (1) and Rule 22 (2).

## Questions Presented

1. (a) Should motions for continuance or change of venue have been granted where an attempt on the life of the attorney for the chief prosecution witness occurred only 34 days before commencement of trial and precipitated a barrage of prejudicial publicity which fed the public suspicion that the defendants were the culprits?

   (b) Should the additional publicity generated by good-faith motions for continuance or change of venue be disregarded in assessing the prejudice to defendants?

2. (a) Was it error to permit Government counsel to argue in effect that disbelief by the jury of the only witness to the *corpus delicti*, whose credibility was the sole issue in the case, was the equivalent of calling the prosecuting attorney and investigative agency perjurers?

   (b) Does the fact that the argument was repeated after being struck by the court on the first occasion require entry of judgments of acquittal where an immediate corrective instruction was forestalled by Government counsel's denial that he had made the argument?

3. Is an *attempt* to perform an act of committing a crime of violence, within the meaning of 18 U.S.C. 1952, established merely by evidence that defendants pointed out to a hired killer the haunts of the intended victim?

## Statutes Involved

18 U.S.C.A.

§ 371. *Conspiracy to commit offense or to defraud United States*

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

18 U.S.C.A.

§ 1952. *Interstate and foreign travel or transportation in aid of racketeering enterprises*

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or
(2) commit any crime of violence to further any unlawful activity; or
(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

## Statement of the Case

### A. *The Proceedings Below*

This is a petition seeking review of judgments of the Court of Appeals for the First Circuit affirming judgments of conviction of the District Court for the District of Massachusetts.

The indictment, returned on June 20, 1967 (P.R. 2), is in three counts. The first count charges that the three defendants and one Joseph Baron (the Government's prin-

cipal witness) conspired to violate 18 U.S.C. §§1952(a)(2) and (3) with intent to commit murder to further an unlawful gambling enterprise. The second and third counts charge certain of the defendants with substantive violations of §1952(a)(2). (P.R. 22-27).

On January 30, 1968, an attempt was made on the life of John E. Fitzgerald, Jr., legal counsel to the Government's principal witness, Joseph Baron. Motions for continuance bottomed on the resulting publicity were thereupon filed by all three defendants (P.R. 34-37) and allowed by the trial court. By Order dated February 2, 1968, it continued trial until March 4, 1968. (P.R. 38).

On February 20, 1968 (P.R. 14, 15), a second motion for continuance, alleging a continuation of the same conditions of prejudice, was filed by each of the three defendants. (P.R. 38-39). On the same date (P.R. 15), the defendants also filed motions for change of venue to the Southern District of New York. (P.R. 40). After hearing, the trial court, on February 27, 1968, denied both motions. Its memorandum decision, dated February 27, noted that a prior motion for change of venue had been waived by all defendants on October 30, 1967; that, because of possible prejudicial publicity (prior to the Fitzgerald incident), trial had been delayed to February 5, 1968, and again delayed (after the Fitzgerald incident of January 30) to March 4, 1968; and that no prior motion for change of venue had ever been pressed. (P.R. 41-42).

On the morning of the date fixed for trial, March 4, 1968, the defendants again filed motions for continuance and change of venue, alleging worsened conditions of prejudice. (P.R. 18, 42-43). Relying on its memorandum of February 27, the trial court, after hearing, denied both motions. (T.T. 3-11).

On March 4, 1968, the case proceeded to trial and concluded on March 8 with verdicts of guilty as to each

defendant on every count in which he was named. (P.R. 19).

B. *The Pre-Trial Publicity*

The motions for continuance and change of venue which are the subjects of this petition are those which were filed on February 20, 1968, and again on the morning of trial, March 4, 1968. They are bottomed on a long history of publicity, beginning with the widely publicized "Valachi hearings", so-called, of 1963, which named the defendant Patriarca as "Boss" of the New England "Cosa Nostra" or "Mafia" and the defendant Tameleo as one of his subordinates. It is a matter of common knowledge that the publicity, surrounding Patriarca, at least, multiplied and persisted uninterrupted down to May, 1967, when the Government disclosed, in connection with a tax-evasion prosecution in Rhode Island, unconnected with Patriarca, that his office in Providence had been "bugged" for three years and that both he and Tameleo had engaged in highly compromising conversations with others. See, *e.g.*, Boston Sunday Advertiser, May 21, 1967.[2] (E.R. 1a-2a).

Almost immediately thereafter, the public was afforded a preview of the instant indictment, which was about to be returned on June 20, 1967. News reports began to appear that a "Mafia strongarm man", Joseph (Barboza) Baron, was "singing" to the F.B.I. The reports were embellished with accounts of theretofore unsolved murders and Baron's desire to avenge those victims who were his friends. Explicit reference was made to Patriarca and the Mafia's connection with these murders, and the need for heavy security precautions against gangland retaliation was dwelt upon. See *e.g.*, Boston Record American, May 25, 1967; Boston Globe, May 26, 1967. (E.R. 4a-5a).

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[2] The newspaper articles in evidence are merely representative. The full extent of the publicity had, as a matter of physical necessity, to be left to judicial notice.

Then, with the return of the instant indictment on June 20, and the arraignment of the defendants on June 26, 1967, the whole performance was repeated by the news media, but with the addition of statements by the United States Attorney that this marked the first instance of a Cosa Nostra insider turning state's evidence. See, *e.g.*, Boston Globe, June 22, 1967. (E.R. 15a).

The defendants Patriarca and Tameleo continued to make news in October, 1967, when, as a result of testimony by Baron before a state grand jury, Tameleo was indicted and arrested for complicity in the murder of Edward Deegan. See, *e.g.*, Boston Herald Traveler, October 27, 1967. (E.R. 20a).

Then, in January, 1968, the defendant Cassesso appeared in the forefront with the news that he was one of three indicted by a state grand jury for conspiracy to cause another falsely to confess to the Deegan murder. This served also to revive interest in Tameleo as one of those originally indicted for the murder. See, *e.g.*, Boston Globe, January 16, 1968. (E.R. 21a).

The final calamity struck on January 30, 1968, when Baron's attorney, John E. Fitzgerald, Jr., was nearly killed by a bomb wired to the ignition of his automobile. The public commotion that followed, as reported by the various media of news, made it devastatingly clear that the motive for the attempt on Fitzgerald's life was his representation of Baron, the "underworld informer". The reports were that Baron was "slated to make his second court appearance[3] to give state's evidence next Tuesday in Federal District Court here", Boston Globe, January

[3] His first court appearance had been in January, 1968, when he testified against Gennaro Angiulo and two others charged with first degree murder. That case had been the subject of a separate stream of publicity since the prior August and affected the appellants here to the extent that Angiulo was constantly referred to as Patriarca's chief lieutenant.

31, 1968 (E.R. 28a), and that "Fitzgerald was listed as a prospective witness in a racketeering prosecution scheduled to begin shortly in Federal Court here," but that the United States Attorney would "neither confirm nor deny" this. Boston Globe, February 1, 1968. (E.R. 45a).

With the trial scheduled to begin on Tuesday, February 6, 1968, the trial court, in the midst of the tumult, had no alternative but to grant the defendants' motion for continuance. By Order dated February 2, 1968, the trial was postponed to March 4, 1968. (P.R. 38). The news reports of the postponement served further to identify the murder attempt with the defendants. The Boston Herald Traveler of February 3, 1968, denied any responsibility for the postponement (E.R. 62a) and, on the following day, in a Sunday feature story, speculated whether Fitzgerald was actually scheduled to testify for the prosecution. (E.R. 72a).

The publicity continued without respite after the Order of postponement. The Governor, the state's Attorney General, the Senate President, members of the state legislature, local District Attorneys, spokesmen for the various state and municipal police agencies, lawyers, Bar Associations, and newspaper columnists and editorialists all variously joined in condemning the vicious deed, deploring the contempt it displayed for judges, juries, and other agencies of law enforcement, analyzing its motives and causes, urging a $50,000 reward for the capture of the culprit, praising Fitzgerald, reviewing his background and that of Baron, identifying Baron and Valachi as the only two major informers of the past ten years, promising action and calling for it from others, decrying inaction and placing blame for it elsewhere, having their pictures taken at Fitzgerald's bedside, quarreling over jurisdiction and calling for an end to the quarreling, providing security

for Fitzgerald, his family, and a witness to the bombing, accusing one another of making political capital out of the incident, raising a fund to aid the Fitzgerald family, demanding intensified investigations of organized crime, announcing threats against the lives of the District Attorney of Middlesex County, a newspaperman, and Fitzgerald's law partner, and generally commenting on the great need for public action in combatting organized crime and its leaders, who, as the attempt on Fitzgerald's life demonstrates, pose a previously unrecognized threat to the safety of innocent people. (E.R. 73a-100a).

Finally, with the uproar still raging, on February 20, 1968, the defendants filed new motions for continuance, alleging a continuation of the same conditions of prejudice. (P.R. 14, 15, 38-39). At the same time, motions for a change of venue to the Southern District of New York were filed. (P.R. 15, 40). After hearing, both motions were denied. In a memorandum dated February 27, 1968, the trial judge, without mention of the bombing incident, interpreted the publicity as involving merely the Mafia or Cosa Nostra and concluded that such publicity was likely to continue indefinitely throughout the nation. (P.R. 41).

The motions, although heard *in camera,* and the trial court's memorandum decision denying them generated more publicity of their own in the week before trial. (E.R. 102a-104a). Included was a report that Marfeo was eventually slain a year later only "one block from Patriarca's office on July 13, 1966' (E.R. 103a), although the indictment did not allege, nor was any evidence adduced at trial, that the alleged conspiracy or attempt achieved its object. Included as well were references to the Mafia and Cosa Nostra. (E.R. 103a-104a).

Also in this interim period, only 3 days before trial, the press reported the appearance, before a state legislative committee, of Correction Commissioner John A. Gavin

urging favorable action on a so-called "Barboza Protection Bill" (permitting transfer of prisoners to federal custody for protection from the underworld) and included in the same article references to the three defendants, their upcoming trial and the Fitzgerald bombing incident. (E.R. 105a).

Then, on the morning of trial, March 4, 1968, the defendants filed new motions for continuance and change of venue, alleging a continuation, and increase in tempo, of the publicity and bringing the record up to date. These motions were denied with a statement by the court that it was incorporating the same reasons as set forth in its memorandum of February 27, denying similar motions filed February 20, 1968. (T.T. 8).

C. *Substantive Trial Testimony*

A surveillance by the Rhode Island State and Providence police forces between January and March 3, 1965, disclosed that one William Marfeo was conducting an illegal dice game at the Veterans Social Club, located in the Federal Hill section of Providence, Rhode Island. (T.T. 35-41, 69-73). On March 3, 1965, a raid was mounted on the premises, gambling paraphernalia was seized, and those present, including Marfeo, were arrested. (T.T. 41-47, 73-75, 80-81, 90).

On March 4, 1965, a captain of the Providence Police asked the defendant Patriarca for assistance in persuading Marfeo to stop the dice game. (T.T. 331-332, 334).

In May, 1965, remodelling of the Social Club began, obviously to obstruct further police interference, and was followed by a resumption of the activities observed prior to the raid of March 3, 1965. (T.T. 92-95, 100-101).

Against the foregoing background, the Government's principal witness, Joseph Baron, born "Barboza" (T.T. 118), testified that, on a Monday in late June or early July,

1965, during the course of a telephone conversation between Boston and Providence, he was invited by Tameleo to come to Providence and to bring with him the defendant Cassesso. (T.T. 133-142).

On the next morning, a Tuesday, Baron and Cassesso drove from Boston to Providence, where they had a conversation with Patriarca and Tameleo. Patriarca stated that he wanted Baron and Cassesso to kill Marfeo because the latter's refusal to stop his illegal dice game was drawing heat (*i.e.*, intensification of law enforcement activity), thereby disrupting Patriarca's gambling enterprise, located in the same area. Baron and the defendant Cassesso agreed to do the killing without compensation. (T.T. 147-155). On the same day at Patriarca's suggestion, Tameleo pointed out to Baron and Cassesso two places frequented by Marfeo. (T.T. 155-160).

On the next morning, a Wednesday, Baron was told by Tameleo, and again by Patriarca, that the police had learned of Patriarca's dispute with Marfeo and that Patriarca therefore wanted further action postponed. (T.T. 164-167).

D. *Adjective Trial Testimony*

The cross-examination of Baron revealed a man who, by common consent (T.T. 208) and his own admission (T.T. 208-209), was a murderer for profit. He had a lengthy and serious criminal record (T.T. 257-263), had spent 16 of his 35 years in prison (T.T. 119-120), was then serving a state sentence of 4 to 5 years on various gun carrying charges (T.T. 118-119), had five or six state indictments still pending against him (T.T. 287), including one or more for being an habitual criminal (T.T. 201), and, in desperate expectation of serving an additional twelve to fifteen years (T.T. 192), had been planning to escape from prison and

rejoin his paramour. (T.T. 216). Then, according to his testimony, at a time when he was very deeply concerned about his future (T.T. 187), he received an offer of "help" from agents of the FBI in exchange for his "help" (T.T. 200) and was thereafter transferred to another prison for "brainwashing." (T.T. 214). While in prison, he wrote to his paramour that he had "a few aces up his sleeve" (T.T. 216) and that "30 would go" whether "innocent or not". (T.T. 268). He was promised by the Government that his cooperation would be brought to the attention of the state courts in connection with the indictments pending against him[4] (T.T. 286-287) and that he would not be indicted in the instant matter. (T.T. 184-185, 311-312). Then, after giving his testimony before the grand jury which returned this indictment, he was transferred to federal custody and allowed to live with his wife (T.T. 281) and continue his illicit "loansharking" business. (T.T. 228-230). In the meantime, he had been negotiating to sell book and moving picture rights to the story of his exploits (T.T. 219-225), and had planned to avenge the deaths of his friends and the theft from them of some $70,000 intended for him. (T.T. 292-295).

The credibility of other Government witnesses, none of whom directly corroborated Baron, was not challenged on cross-examination. The only other adjective evidence was supplied by an agent of the FBI, Dennis Condon, who testified that he promised Baron that he would transmit to the United States Attorney Baron's fears for the safety of his wife and child and that the degree of Baron's cooperation would be made known to the state's District Attorney. He further testified that he heard the United States Attor-

[4] On November 1, 1968, Baron appeared in the Superior Court for Suffolk County with his attorney, John Fitzgerald, on these indictments, which were ordered "filed" indefinitely.

ney promise Baron that, if Baron cooperated, he would not be indicted. (T.T. 310-312).

E. *The Government's Summation*

With the evidence in this state and against the background of the pre-trial publicity heralding Baron as the great informer, the stage was set for jury summations built exclusively around the issue of the credibility of Baron, the Government's sole witness to the *corpus delicti.*

At the conclusion of arguments by defense counsel, the United States Attorney began his summation and, after one, short introductory paragraph, proceeded as follows (T.T. 497):

> "At the outset I would like to comment briefly upon defense counsels' arguments.
>
> "Basically all of them say that Joseph Baron and Joseph Baron's testimony is not fact, it's fiction. If you accept that, you also accept the fact that that fiction was written, produced and directed by the United States Attorney's office, by the Federal Bureau of Investigation, by the police in Revere and the police in Boston—
>
> "Mr. Curran: I object.
>
> "Mr. Chisholm: There is no such evidence. I object, your Honor.
>
> "Mr. Balliro: That argument hasn't been made by the defense.
>
> "The Court: Strike it out, please."

Then, after some nineteen more transcript pages of argument to the effect that Baron was in fact telling a credible story and was in fact corroborated by events testi-

fied to by other witnesses, the prosecutor continued to argue as follows (T.T. 516-517):

> "Did all this testimony from these people who way back to 1965 probably never heard of Joe Baron, all of a sudden just begin to fit together when Joe Baron decides he is going to testify?
>
> "I say that is an insult to your intelligence, and I also say that if Joe Baron is guilty of making it fiction, then I am guilty of making it fiction, and the FBI is guilty of making it fiction and every other witness who testified in this case is guilty of making up fiction.
>
> "Mr. Balliro: I object.
>
> "The Court: That may be argued."

The argument proceeded only for another page of the transcript and, immediately upon its conclusion, defense counsel orally moved at the bench for mistrial on the basis of the above-quoted portion (T.T. 521), which motion was denied (T.T. 523). The following colloquy occurred at the bench (T.T. 521-523):

> "Mr. Balliro: We move for a mistrial, based upon the grounds—
>
> * * *
>
> "Mr. Balliro: It has to do with the government attorney identifying himself with Mr. Baron to the extent that if this jury believes Mr. Baron and feels he is a liar they also must feel the attorneys for the government and the officers—
>
> "The Court: Strike that out.
>
> "Mr. Balliro: It was left in the last time he argued it again.
>
> "Mr. Markham: I didn't say that.

"The Court: What was that?

"Mr. Balliro: We don't believe that Mr. Markham is a fabricator or anything of that sort. I have known him for a long time and I consider that he is a friend. I think it is prejudicial argument and it sort of puts Mr. Markham in the role of—

"The Court: It is trivial, Joe.

"Mr. Balliro: I think it is an effective argument.

"The Court: I ruled it out at one time when he put himself in the picture. He did it again. Did you do it again?

"Mr. Markham: No, Judge. I said if this is fiction, then every witness who appeared here is fiction.

"The Court: You weren't a witness. Did you put yourself in there?

"Mr. Markham: I asked a few leading questions on occasion, Judge.

"The Court: You all commit that error, but you can't help that. All lawyers do it.

"The motion for mistrial, Mr. Balliro, is denied. (Adjournment.)"

## Reasons for Granting the Writ

I. Questions of Broad Importance to the Administration of Criminal Justice in the Federal Courts Are Presented.

A. *Prejudicial Pre-Trial Publicity*

In recent times there has been an increasing recognition that a new trial must be granted where prejudicial publicity has infected a trial and the court has not taken adequate measures to counteract it. *E.g., Sheppard* v. *Maxwell*, 384 U.S. 333 (1966); *Rideau* v. *Louisiana*, 373 U.S. 723 (1963); *Irvin* v. *Dowd*, 366 U.S. 717 (1961);

*Janko* v. *United States*, 366 U.S. 716 (1961); *Marshall* v. *United States*, 360 U.S. 310 (1959); *United States ex rel. Bloeth* v. *Denno*, 313 F.2d 364 (2d Cir. 1963); *United States* v. *Kum Seng Seo*, 300 F.2d 623, 624-626 (3rd Cir. 1962); *Delaney* v. *United States*, 199 F.2d 107 (1st Cir. 1952).

The initial issue, whether petitioners were prejudiced at all by the news of the bombing incident, may be quickly resolved by reference to the trial court's order of February 2 (P.R. 38), which, in granting a continuance to March 4, 1968, necessarily recognized the existence of the asserted prejudice. The simple truth is that, with the news of the bombing, all eyes in New England turned at once to the petitioners as the most likely culprits. It may be true, as the Court of Appeals suggests, that no report directly accused petitioners of responsibility for the bombing. It may also be true that an attempt to kill the chief prosecution witness's lawyer was not cited by the American Bar Association as presenting one of the "greatest hazards" to a fair trial (App. A, 6a). On the other hand, it surely cannot be the law that petitioners may be fairly convicted of crime by a jury which suspects them of resorting to murder in an attempt to avoid trial and conviction whereas, had the same jury been aware, for example, that petitioners refused "to submit to certain tests" (App. A, 6a), fairness would have required a new trial.

Apparently, it was the second issue, the adequacy of the 34-day delay between the bombing and the trial, on which the decision of the Court of Appeals turned. That Court concluded that, although the publicity continued right up to the day of trial (E.R. 106a), its volume was sufficiently reduced by that time to permit a fair trial.[5] In *Delaney*

[5] The last article to treat the petitioners, Baron and the bombing incident in a single package (leaving the necessary inferences to the reader) appeared three days before trial, on March 1, 1968 (E.R. 105a).

v. *United States*, 199 F.2d 107 (1st Cir. 1952), the same Circuit had held inadequate a period of one month and a half between trial and the one-shot publicity arising from the account by a national magazine of a "scandal" involving the defendant. We do not, of course, suggest that this Court lay down an objective time standard by which to measure the dissipation of prejudice. On the other hand, the apparent rule of the First Circuit here enunciated, that virtually any lapse of time is sufficient so long as the publicity has begun to subside before trial, seems wholly unreasonable.

A third question, which is apparently entirely new, arises from the appellate court's suggestion that publicity engendered by motions for delay and change of venue should be excluded from consideration in assessing the quantum of prejudice affecting the defendants. We submit that an alternative rule would not mean that "cases would never be tried", as the Court of Appeals suggests. (App. A, 5a). Surely, some standards can be devised by this Court which would guide the lower courts in determining the weight to be given to publicity generated by defense motions. We would suggest that, at the very least, the lower courts should be required to consider whether the motion is colorably meritorious, whether brought in good faith, and whether counsel has taken all reasonable steps, including a request for a closed hearing, to avoid further publicity. Without the intervention of this Court one can only speculate as to how many meritorious motions for continuances or change of venue will be withheld in the future solely because defense counsel are unwilling to risk the consequences of failure.

B. *Improper Argument by Government Counsel*

The general rule in the lower Federal courts seems to be that a prosecutor may express his personal belief as long

as he does not hint that such belief is supported by evidence known only to him. See *United States* v. *Medlin,* 353 F.2d 789, 796 (6th Cir. 1965). The First Circuit, in refusing to follow this rule, has condemned all statements of personal belief regardless of whether they hint of secret evidence. See *Greenberg* v. *United States,* 280 F.2d 472, 475 (1st Cir. 1960). This Court, on the other hand, in a situation where the asserted impropriety was invited and not objected to, seems to have approved the general rule. *Lawn* v. *United States,* 355 U.S. 339, 359, fn. 15 (1958).

In the instant case, the Court of Appeals found that the prosecutor's argument "was a back-handed way of laying one's credibility on the line" to support a case which "depended wholly on the credibility of" (App. A, 14a) one man, who "was a highly vulnerable witness" (App. A, 9a), but that the error was harmless because "all of the many factors which made [Baron's testimony] susceptible to impeachment were fully presented and fully argued" (App. A, 15a) and because defense counsel did not press its objection to the point of suggesting that the allegedly improper portion of the argument be read back to the trial court by the reporter.

That the entire case depended on the credibility of a single, highly vulnerable witness was precisely the point of the petitioners' objection below. The one vital piece of evidence lacking in the Government's case was direct corroboration of Baron. In their summations, defense counsel had directed their entire attack against Baron's credibility and the lack of evidence directly corroborating him. All that the Government's case lacked to tip the scales, if not already askew because of the jury's suspicions concerning petitioners' responsibility for the bombing,[6] was some

[6] Petitioners submit that the prejudicial publicity cannot be separated from the improper argument and that the two issues should be considered together in assessing the total prejudice to petitioners in what

indication that Baron did not stand alone. This critical deficiency was supplied by the prosecutor's statement of personal belief, which, rather than being submerged in the extensive arguments of all counsel directed toward the evidence, exploded the entire foundation of petitioners' defense in one sudden and dramatic burst.

Moreover, this was not a case merely of an expression of personal belief in the witness's credibility. Had that been all, petitioners might at least have hoped that the jury would conclude that the United States Attorney was guilty only of bad judgment in believing Baron and that a verdict of acquittal would not be taken by him as a personal affront. The prosecutor, however, went far beyond this. His argument was transparently designed to create in the mind of the jury the impression that a verdict of acquittal would be the equivalent of a charge of perjury against him. In other words, the United States Attorney did not say to the jury merely, "I believe Baron", but rather, "You have no choice but either to believe Baron or to call me a liar!"

To make matters worse, if that were possible, the prosecutor threw into the scales against the defendants the integrity of the highly respected FBI. Since the only FBI witness to appear at the trial testified, without attempt at impeachment, only on the narrow issue of the promises made to Baron (T.T. 307-312), the argument made by the United States Attorney could not have had reference to the credibility of FBI agents as witnesses. Moreover, since the reference was to the FBI generally as an investigative agency, the obvious inference was that that agency, as well as the office of the United States Attorney, was in possession of secret evidence corroborating Baron.

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otherwise would have been a "weak" case against them. See *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 239 (1940); *Berger* v. *United States*, 295 U.S. 78, 88-89 (1935).

Finally, it is significant that the argument was made twice, once at the very beginning and once at the very end, thereby assuring the Government that, regardless of the court's rulings, some part of the thought would take root and survive the jury's deliberations. Thus, even had the trial court sustained the objection on the second occasion, the petitioners would have been entitled to a grant of their oral motion for mistrial. (T.T. 521). See *Kitchell* v. *United States,* 354 F.2d 715 (1st Cir. 1966), where the court said, at 719:

> "The government cannot go on, however, making such remarks and having the court strike them out, and then claim they had no effect."

This petition, however, seeks more than a new trial. Petitioners submit that, because of the prosecutor's deliberate conduct in repeating the improper argument, they are entitled to judgments of acquittal as the only appropriate remedy against the harassment of successive prosecutions, see *Downum* v. *United States,* 372 U.S. 734, 736 (1963), as once suggested by the First Circuit in similar circumstances. *Fleming* v. *United States,* 332 F.2d 23, 25 (1st Cir. 1964). The deliberateness of the prosecutor is demonstrated not only by his repetition of an argument already once struck by the trial judge, but by his diverting and misleading the trial judge on the occasion of the motion for mistrial and by his later admission in the appellate court that the improper argument was intended as retaliation against the "vicious attacks" of defense counsel. (App. A, 8a).

As to the lower court's holding that it was defense counsel's obligation to suggest that the reporter's notes be read back after the prosecutor twice denied making the offending statements, it should be noted that this solution was equally

obvious to the trial judge. He had already characterized the objection as "trivial" and quite obviously did not think the matter important enough to recall the reporter (who had left the courtroom because working in relay with another reporter) and to have him locate the offending passage in his notes. Moreover, the emphatic denials of the prosecutor tended to shake the confidence of defense counsel that they had heard correctly in the first place. A good many of the cases raising the issue of improper argument turn on the failure of defense counsel to interpose timely objection, but now to hold that counsel must presume to guide the court on such obvious matters as the verification of the contents of its own record is to convert the defense of criminal cases into a contest befitting only the most meticulous precisionists. "It would be ignoring the realities of criminal practice to place such a heavy emphasis on the adversary system." See *Harris* v. *United States,* D.C. Cir. 9/17/68, slip op. at 7 (concurring opinion of Bazelon, C. J.).

The importance of these issues in the Federal courts is best demonstrated by the fact that the District of Columbia Circuit recently felt obliged to treat the subject in an extensive dictum "because of the frequent non-observance of the prohibition against expressions of personal opinions on the ultimate issue by counsel." See *Harris* v. *United States, supra* at 4. After further characterizing these frequent breaches of forensic ethics as a "cause for alarm", *id.* at 6, fn. 5, it concluded that, "[s]ince a large number of lawyers — prosecutors and defense attorneys alike — seem to be uninstructed in the rudimentary elements of proper advocacy", it is incumbent on trial judges to supply the necessary instruction, by disciplinary mechanisms if necessary. *Id.* at 6-7. We respectfully submit that, before trial judges can be expected to lay down uniform rules

throughout the Federal system, some initial guidance is needed from this Court.

C. *The Sufficiency of the Evidence To Establish an "Attempt"*

An essential element of the substantive crimes charged in the instant indictment is an "attempt" to commit the intended murder. The only evidence on the issue was that defendants pointed out to Baron on two occasions a total of four or five establishments frequented by the intended victim, Marfeo. Obviously, the District Court, in denying motions for judgments of acquittal, disregarded the "well known" distinction in the criminal law between mere preparation and attempt. See *Swift & Co.* v. *United States*, 196 U.S. 375 (1905).

Although the issue was not treated by the Court of Appeals, because of the imposition of concurrent sentences on the conspiracy and substantive counts, petitioners intend to raise the point if certiorari is granted. If there is to be a new trial on the conspiracy count, we respectfully urge on the Court the basic unfairness of requiring the defendants simultaneously to defend against substantive charges of which they are, on the basis of one full trial, wholly innocent. Cf. *United States* v. *Bentvena*, 319 F.2d 916, 954-955 (2d Cir. 1963).

## Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

FRANCIS J. DIMENTO
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RONALD J. CHISHOLM
*Attorney for Petitioner Cassesso*

JOSEPH J. BALLIRO
*Attorney for Petitioner Tameleo*

**Appendix A**

# United States Court of Appeals
## For the First Circuit

No. 7126.

RAYMOND PATRIARCA,

DEFENDANT, APPELLANT,

*v.*

UNITED STATES OF AMERICA,

APPELLEE;

No. 7127.

RONALD J. CASSESSO,

DEFENDANT, APPELLANT,

*v.*

SAME; and

No. 7128.

HENRY TAMELEO,

DEFENDANT, APPELLANT,

*v.*

SAME.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before ALDRICH, *Chief Judge,*
McENTEE and COFFIN, *Circuit Judges.*

*Francis J. DiMento*, with whom *Charles A. Curran* and *DiMento & Sullivan* were on brief, for Raymond Patriarca, appellant.
*Ronald J. Chisholm* for Ronald J. Cassesso, appellant.
*Joseph J. Balliro* for Henry Tameleo, appellant.
*Edward F. Harrington*, Assistant U. S. Attorney, with whom *Paul F. Markham*, United States Attorney, and *Walter T. Barnes*, Special Attorney, Department of Justice, were on brief, for appellee.

October 14, 1968.

COFFIN, *Circuit Judge.* These are appeals from judgments of conviction following jury verdicts on an indictment in three counts. The first count charged all of the appellants with conspiracy, in violation of 18 U.S.C. § 371, to travel and use the telephone in interstate commerce with intent both to commit murder to further an unlawful gambling enterprise, in violation of 18 U.S.C. § 1952(a)(2), and to promote such enterprise, in violation of 18 U.S.C. § 1952(a)(3); and thereafter to attempt to commit such murder and acts of promotion. The chief witness for the prosecution, one Baron, was named as a co-conspirator but not a defendant. Other substantive counts charged appellant Tameleo with using a telephone facility in interstate commerce and appellants Patriarca and Tameleo with causing Baron and appellant Cassesso to travel in interstate commerce pursuant to the same intent, followed by an attempt.

The district court is alleged to have erred in denying a motion for continuance and change of venue because of prejudicial publicity; in refusing to grant a mistrial for prosecutorial expression of belief during the closing argument; and in denying various motions to strike part of the indictment, to grant a severance, to enter judgments of acquittal, and to make a requested instruction.

## MOTIONS FOR CONTINUANCE AND CHANGE OF VENUE

Appellants, in alleging error by the court in refusing their motions for continuance and change of venue filed on February 20, 1968 and at the opening of trial on March 4, 1968, refer in their brief to

> ". . . a long history of publicity, beginning with the widely publicized 'Valachi hearings', so-called, of 1963, which named the defendant Patriarca as 'Boss' of the New England 'Cosa Nostra' or 'Mafia' and the de-

> fendant Tameleo as one of his subordinates. It is a matter of common knowledge that the publicity, surrounding Patriarca, at least, multiplied and persisted uninterrupted down to May, 1967, when the Government disclosed, in connection with a tax-evasion prosecution in Rhode Island, unconnected with Patriarca, that his office in Providence had been 'bugged' for three years and that both he and Tameleo had engaged in highly compromising conversations with others."

Subsequently, in May of 1967, newspapers in Boston published stories that a Mafia "strongarm", one Joe (Barboza) Baron, had been "singing" to the FBI, referring to appellant Patriarca as a Cosa Nostra boss. Then on June 20, 1967, the date of the indictment in this case, there were more newspaper headlines and accounts concerning all appellants and Baron. The newspaper clippings included as exhibits in the record before us contain no items between July 10, 1967 and October 27, 1967, when appellant Tameleo was named as having been indicted, after grand jury testimony by Baron, for a slaying unrelated to these appeals and as being an aide to "New England Cosa Nostra boss Raymond Patriarca".

On October 30, 1967, pursuant to appellants' first motion for change of venue on July 26, 1967, hearing was had *in camera*. Counsel for appellant Patriarca, alleging nationwide publicity, waived his motion for a change of venue and requested a continuance of four or five months. The court stated that the case would not be tried until after the first of the year and on January 22, 1968 set the date of trial for February 6.

In the meantime, on January 16, 1968, there had been several newspaper accounts of the indictment of appellant Cassesso for conspiracy to incite a fellow prison inmate to confess falsely to a murder. These, however, were of small moment compared to the figurative and literal bomb-

shell of January 30, 1968 when Baron's attorney, John E. Fitzgerald, Jr., was almost killed by a bomb wired to the ignition of his automobile. Widespread reporting of and editorializing on the bombing ensued.

On February 2, 1968, appellants moved for a continuance, which was granted until March 4. On February 20 motions for continuance and a change of venue to New York were filed, hearing was had *in camera,* and the motions were denied on February 27, the court observing in a memorandum that the newspaper articles on which the motions were based concerned the Mafia and Cosa Nostra and made no specific reference to defendants; that such articles are constantly appearing in New York as in New England; and that the climate for a fair trial was far more favorable than on October 30, 1967. Similar motions were filed on the day of trial, March 4, based on recent publicity, and were denied for the reasons given on February 27. These two rulings are now before us.

Appellants argue that the prejudice created by the February news accounts, was "the connection of the defendants, in the public's mind, to the bombing incident." The record of newspaper clippings before us, apparently assembled through a clipping service, contains, exclusive of duplications, seventy items from newspapers in Boston and five other major Massachusetts cities covering the period from January 31 to March 4. While not complete and not including any data on television and radio reports, we must take it as reasonably representative. We report the results of our scrutiny in the margin.[1]

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[1] Articles mentioning the bombing and subsequent investigations were published as follows:

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| Jan. 31 - Feb. 6 (1 week) | 50 |
| Feb. 7 - Feb. 20 (2 weeks) | 10 |
| Feb. 21 - Mar. 4 (13 days) | 2 |

In addition, between February 21 and March 4, there were 8 articles reporting only appellants' February 20 request for change of

In none of the newspaper accounts were appellants linked with the Mafia or Cosa Nostra or with the Fitzgerald bombing. In none were the acts alleged in the indictment reported. In only one article, published one month before trial, was Baron labelled a Cosa Nostra informer; he was elsewhere uniformly referred to as an underworld or gangland informer. Even more significant are the facts that the amount of coverage diminished sharply after the week following the bombing and that, subsequent to appellants' filing motions on February 20, the subject matter was almost wholly that of the making and disposition of the motions themselves.

Under these circumstances, we cannot say that the court abused its discretion. Indeed, the sharp diminution of decibels after the first week following the Fitzgerald bombing indicates that a month's delay was a realistic estimate. That a rash of stories centered about moves for further delay was inevitable; if such could be ground for continuance, cases would never be tried.

We are mindful of the authorities relevant to this issue. But there is here lacking as of the time of the relevant motions, the kind of incriminating nexus that was present in *Rideau* v. *Louisiana,* 373 U.S. 723 (1963) (out of court confession widely seen); in *United States* v. *Dioguardi,* 147 F. Supp. 421 (S.D. N.Y. 1956) (publicity of recent trial testimony incriminating defendants); in *Delaney* v. *United*

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venue and decision thereon. These made no reference to the bombing.

Only two articles (apart from one report of the court's memorandum of February 27, summarized above) mentioned the Cosa Nostra, these occurring a month before trial. Two of three articles mentioning Baron as a government witness appeared over a month before trial as did two references to Fitzgerald being a possible witness.

There was only one reference to appellants Cassesso and Tameleo, this in connection with another indictment. Of the fourteen references to appellant Patriarca, one referred to the indictment, five to the February 2 postponement, and eight to the February 20 motion for change of venue.

*States,* 199 F.2d 107 (1st Cir. 1952) (widely publicized Congressional hearings on the "scandal" involving defendant); in *Marshall* v. *United States,* 360 U.S. 310 (1958), and in *Coppedge* v. *United States,* 272 F.2d 504 (D.C. Cir. 1959), *cert. denied,* 368 U.S. 855 (1961) (widespread publicity of excluded or inadmissible information).

Nor do we find a suggestion of the kind of prejudicial statements or records of conviction, arrests, or indictments emanating from a public official, zealous attempts by the media to arouse a community on a particular trial, reports of refusal to submit to certain tests, pejorative characterizations of a defendant, description of evidence against the accused or reports of plea negotiation cited as presenting the "greatest hazards" to a fair trial by the ABA, *Standards Relating to Fair Trial and Free Press,* (Tentative Draft, Dec. 1966), pp. 25-40.[2]

Following the denial of the motions for continuance and change of venue, there was another opportunity for counsel to mitigate any possible effect of pre-trial publicity—on the voir dire. Counsel for one of the appellants requested that the court "ask a question of the jury in connection with this case, in the light of all the publicity." The court replied that it would "put to them a general question and ask them if there is any member of the jury here who feels that he would not be able to give the defendants a fair and impartial trial." Counsel said, "Fine, thank you, your

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[2] What we have said on the issue of pre-trial publicity also disposes of appellants' motions for severance which were sought on the same basis as the original motions for change of venue, preceding the continuance granted on October 30, 1967, and not thereafter renewed. Absent "a strong showing of prejudice", *Sagansky* v. *United States,* 358 F.2d 195, 199 (1st Cir.), *cert. denied,* 385 U.S. 816 (1966), which we do not find here, it is customary to try conspirators together. *Opper* v. *United States,* 348 U.S. 84, 95 (1959). To the extent that claimed prejudice may arise from association with others, such association would be revealed in any event from the factual situation presented at the trial.

Honor." The question was put. No response was forthcoming. The court stated that it assumed that all were "in agreement on this particular question." The jurors were then sworn and thereafter sequestered.

While the court did all that was requested at this juncture, and cannot under the circumstances of this case be charged with error in not inquiring further, *sua sponte,* we feel bound to concede that such a single question posed to the panel en bloc, with an absence of response, achieves little or nothing by way of identifying, weighing, or removing any prejudice from prior publicity. In cases where there is, in the opinion of the court, a significant possibility that jurors have been exposed to potentially prejudicial material, and on request of counsel, we think that the court should proceed to examine each prospective juror apart from other jurors and prospective jurors, with a view to eliciting the kind and degree of his exposure to the case or the parties, the effect of such exposure on his present state of mind, and the extent to which such state of mind is immutable or subject to change from evidence. In this we are in accord with the suggestions of section 3.4 of ABA, *Standards Relating to Fair Trial and Free Press,* (Tentative Draft, Dec. 1966), pp. 130-137.[3]

## PROSECUTORIAL SELF-REFERENCE

Appellants seek not only reversal of their convictions but judgments of acquittal because of the conduct of the prosecutor in injecting his own belief into his closing argument. They describe the comment as "outrageous", in bad faith, and utterly unprovoked by any defense argu-

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[3] These pages of the tentative draft were specifically endorsed by the *Report of the Committee on the Operation of the Jury System on the "Free Press-Fair Trial" Issue*, p. 39 n. 37. This Report was formally approved by the Judicial Conference of the United States on September 19, 1968.

ment. Appellee denies that any comment was made by the prosecutor expressing personal belief in the testimony and that even if such comment were to be so interpreted, it was justified by the "vicious attacks" of appellants' counsel. Finally, appellee argues that the comment could not have been prejudicial. We disagree with all but the last of these positions. We hold that the comment was a prohibited one, to which timely objection was made, that it could not be justified by the argument of appellants' counsel, even though parts of such argument might be interpreted as provocation, but that there was no possibility of its prejudicing the jury under the circumstances of this case. F. R. Crim. P. 52(a).

This conclusion stems from our evaluation of the challenged comment against the background of all the arguments which we now summarize. The gist of the alleged conspiracy was a plan involving the appellants and Baron to kill one Marfeo, the proprietor of a gambling establishment in Providence. This establishment, which continued to operate after once being raided, had caused overt police surveillance in the area to increase to the point where it caused a decline in the patronage of another gambling establishment in which appellant Patriarca allegedly had an interest. Marfeo refused Tameleo's and Patriarca's requests to cease operations and the decision was made to kill him. Baron and appellant Cassesso agreed to do the job, travelled to Providence and viewed places such as restaurants and bars which Marfeo was known to frequent. Further action was postponed since the police had learned of Tameleo's and Patriarca's dispute with Marfeo.

The testimony of Baron was central to the prosecution's case. All of the evidence of the plan, the phone calls, other conversations, travel, and visits to Marfeo's haunts to implement the plan came from his lips. Other witnesses, principally police and federal agents, filled in the back-

ground—the raid on Marfeo's establishment, Marfeo's continued operations, accelerated surveillance in the area, a police request to appellant Patriarca to try to persuade Marfeo to close shop, the large scale gambling activities of appellant Tameleo, the identification of places Marfeo frequented.

Baron was a highly vulnerable witness. Not only had he spent almost half of his life in prison, but he had been assured that he would not be indicted for the crime at issue here if he testified before the grand jury. In addition he was told that his cooperation in this matter would be brought to the attention of the prosecution in other pending criminal cases. Money from his unlicensed loan operations continued to be sent to him while in prison. Fears for the safety of his wife and child led to her being allowed to live with him in protective custody. On at least two occasions discussions were had on his behalf with writers relating to a book based on his relevations and movie rights, both promising large returns. Letters which he sent from prison referred to FBI representatives saying to him "If you help us, we will help you"; to the purpose of his transfer to the Barnstable House of Correction as being "to brainwash me"; to having "a few aces" up his sleeve; to his doing something sensational with the result that "30 would go" whether innocent or not. After he began to talk to the FBI about the subject matter of this case, there were some fourteen visits in each of which he would add some new detail either previously overlooked or concealed.

Appellants' three counsel zeroed in on their target. They touched all the bases in vigorous, evocative language. The theme was clearly enunciated in these words of the argument: "I say to you that Mr. Barboza—Mr. Baron—is just a liar. That his story is fiction, and it was made up, coolly calculated, in that very cold blood that he admits he has and for very good reasons." Counsel then colorfully delved

into the reasons which he described as "the most tremendous inducements for anybody to lie . . . sex, . . . liberty, and . . . money."

In the course of the ensuing argument for the defense, on the whole proper and evidence-oriented, counsel occasionally made remarks which could be construed as either a personal belief or an attack on the integrity of the prosecution. A failure to introduce evidence alluded to in the prosecution's opening, because of defense counsel's objection, was made the basis for rhetorically asking the prosecution where the promised witnesses were and for remarking to the jury that "that was put in your mind". The word "inducement" was used six times.[4]

The problem with "inducement" is that it does not merely mean "motive". Its primary meaning is "the act or process of inducing", Webster's Dictionary (3d Int. Ed.) p. 1154; it can be easily understood as connoting purpose on the part of the prosecution as well as response on the part of the prospective witness. This possible understanding was reinforced by an appellant's counsel stating, "He is not going to be found guilty of anything"—implying without foundation in the evidence that, with regard to other prosecutions pending against Baron, more than calling the attention of the prosecutor to his cooperation had been promised. A similar observation may be made of counsel's question whether the fact Baron was allowed to live with his wife was "because he is delivering something? Is that the consideration for his being with his wife?" Again the

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[4] The analysis of the evidence began with the statement "I don't think they [sex, liberty, money] necessarily have to be argued in any particular order, but let's try it this way: inducement." One example referred to the promise of immunity from indictment for the present offense in the words: "I suggest that it is a pretty darned good inducement for some of them to lie and say anything he might think someone wants them to say, because what the heck he doesn't have to worry, he is not going to be indicted."

interpretation of a two-way bargain between the prosecution and Baron for incriminating testimony is not unreasonable. Another oblique remark is a reference to the government's "advantage of everything else they might have going for them here". So also with "Now let me get back to show you the type of job that they are trying to do on my client. . . ." and ". . . I'm going to show you the artfulness in this thing."

One counsel for appellants occasionally also spoke in a way permitting the inference that personal belief was being expressed. For example, "When . . . [Baron] looked at [counsel who was cross-examining] in a cold stare and he said yes, and I have seen a lot of things and I have tried murder cases but it made me wince, and do a little shuddering"; ". . . I believe the evidence was that not one of these persons is guilty"; ". . . I think [a verdict of not guilty] is justified by the evidence."

Counsel for the prosecution began by paraphrasing the defense as saying that ". . . Baron's testimony is not fact, it's fiction." He added, "If you accept that, you also accept the fact that that fiction was written, produced and directed by the United States Attorney's office, by the Federal Bureau of Investigation, by the police in Revere and the police in Boston. . . ." Objection was taken and the argument was ordered stricken. The prosecutor then addressed himself to the theme of the defense that Baron had made up the story he told. He sought to verify it by corroboration from other witnesses. In his catalogue of corroboration he cited testimony that Baron knew Tameleo and Cassesso, that Marfeo was running a crap game, that Tameleo was a large scale gambler, that a Providence police captain told Patriarca that he wanted the Marfeo gambling operation closed down, that there was a raid, reconstruction of the premises, renewed operations, increased surveillance or "heat", that Baron's description of the

interiors of places of alleged conversations and observations was both detailed and not challenged, that Baron's identification of Marfeo hangouts checked with police identification.

At this point the prosecutor noted the coincidence of police identification of Marfeo hangouts as of a time prior to the alleged conspiracy with that of Baron. He asked if that was fiction. Then he said, "I say that is an insult to your intelligence, and I also say that if Joe Baron is guilty of making it fiction, then I am guilty of making it fiction, and the FBI is guilty of making it fiction and every other witness who testified in this case is guilty of making up fiction." Objection was taken but the court said "That may be argued" and the questioning continued.

A short time later the argument concluded and counsel for appellants moved for a mistrial, citing as a second reason the above quoted argument. The court, referring to its prior ruling at the commencement of the prosecution's argument, asked if the prosecutor had again "put himself in the picture". The prosecutor said, "No, Judge. I said if this is fiction, then every witness who appeared here is fiction." When asked again by the court "You weren't a witness. Did you put yourself in there?" the prosecutor answered, "I asked a few leading questions on occasion, Judge." The court noted that all lawyers commit such an error and denied the motion for mistrial. The case was adjourned overnight and the jury was charged the following day.

The question sharply posed by appellants is whether Rule 15 of the *Canons of Professional Ethics* of the American Bar Association, as applied by us in *Greenberg* v. *United States,* 280 F.2d 472 (1st Cir. 1960), has been violated. *Greenberg* (having to do with a flagrant self-vouching of a prosecutor as a "thirteenth juror") thrusts farther than Rule 15 and some other judicial authorities. Rule 15 pro-

scribes a lawyer from asserting a personal belief in his client's innocence or the justice of his cause. Such authorities as *Lawn* v. *United States,* 355 U.S. 339, 359-60 n. 15; *Gradsky* v. *United States,* 373 F.2d 706, 710 (5th Cir. 1967); *United States* v. *Medlin,* 353 F.2d 789, 795 (6th Cir. 1965), *cert. denied,* 384 U.S. 973 (1966); *Jones* v. *United States,* 338 F.2d 553, 554 n. 3 (D.C. Cir. 1964); and *United States* v. *Battiato,* 204 F.2d 717 (7th Cir.), *cert. denied,* 346 U.S. 871 (1953) seem to define the impermissible conduct as any expression of belief which indicates that the prosecutor is relying on information other than that which has been presented in court.[5] *Greenberg* proscribes expression of personal belief in the testimony, not only because counsel would then in effect be a witness not under oath or subject to cross-examination but because the false issue of credibility of counsel, with government having the advantage, would be injected.

In *Greenberg* we recognized that at times "special circumstances" may justify a reply but found no such circumstances. Nor do we find such here. We concede that the prosecutor could interpret parts of the defense argument as a subtle, veiled attack on the prosecution's motives and integrity. But we cannot say that counsel for appellants deliberately indulged in excessive argument. At most their comments, as we have endeavored to show, were cloaked in ambiguity. Moreover, if seriously disturbed, counsel for the government concealed that fact for he raised no objections. At least under these circumstances we do not consider that a trespass by the defense gives the prosecu-

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[5] Appellants argue that the prosecutor's reference to the FBI, when only one agent testified, implied that that agency was in possession of secret evidence. We think it clear from the context, however, that the reference was to the corroborating evidence adduced in court which the prosecutor had just summarized.

tion a hunting license exempt from ethical restraints on advocacy.[6]

Coming to the prosecutor's remarks, we observe first that just as the defense argument was ambiguous, so were these. In context, the prosecutor was pointing to corroborating items of testimony given by police and other witnesses, such as places Marfeo was known to frequent, which matched testimony given by Baron. He was arguing that either such items were true or false. If false, not only one police witness was lying, but all were. And since the instruments of the lies were the prosecutor who asked the questions and the witnesses who answered them, it could arguably be said that on this hypothesis the statement that he was "making fiction" was simply factual and not a statement of belief.

This interpretation, while arguable, is not probable. A more likely interpretation is that this was a back-handed way of laying one's credibility on the line. Prosecuting attorneys and law enforcement officials wear an invisible cloak of credibility by virtue of their position; to make it explicit may too easily tip the scales. Moreover, the same play on the "fiction" metaphor had overcarried earlier, stimulating an objection which was sustained.

Nevertheless, viewing the case as a whole, the arguments, and the charge, we cannot find any possibility of prejudice. First, while the case depended wholly on the credibility of

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[6] Our approach may differ from some other circuits. If such cases as *Baiocchi* v. *United States*, 333 F.2d 32, 38 (5th Cir. 1964); *Isaacs* v. *United States*, 301 F.2d 706, 737 (8th Cir.), *cert. denied*, 371 U.S. 818 (1963); *United States* v. *Kiame*, 258 F.2d 924, 934 (2d Cir.), *cert. denied*, 358 U.S. 909 (1958); *Ochoa* v. *United States*, 167 F.2d 341, 344 (9th Cir. 1948); *Malone* v. *United States*, 94 F.2d 281, 288 (7th Cir.), *cert. denied*, 304 U.S. 562 (1938) stand for the proposition that the mere fact that there has been provocation by the defense justifies retaliatory expression of belief which would otherwise be error, we respectfully disagree. At most, we feel, serious provocation would be weighed as a factor in evaluating possible prejudice.

Baron's testimony, all of the many factors which made it susceptible to impeachment were fully presented and fully argued. The occasional oblique expressions of opinion from both sides against the background of a long trial, much evidence on the issue, and lengthy argument addressed to the evidence could not loom sufficiently large to have influence.[7]

Second, all available timely action was not taken to confront the court with the precise language which had been used. The nature of the objection was not clear to the court at the time, as the subsequent colloquy in the motion for mistrial indicated. The appellants see bad faith in the pro-

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[7] Our survey of cases involving expression of personal belief has revealed reversals for far grosser improprieties than were exhibited here. *See*, *e.g.*, *Greenberg*, *supra; Gradsky*, *supra*, ("[The government] has every opportunity to check out and judge the credibility and truthfulness of Mr. Zane and Mr. Gilmore in this case, and in that context . . . we offered you this testimony."); *Dunn* v. *United States*, 307 F.2d 883, 885 (5th Cir. 1962) ("This case is replete with fraud and is one of the most flagrant cases we have ever tried in the Southern District of Georgia.").

We have also noted gross improprieties not resulting in reversals. *See*, *e.g.*, *Del Cristo* v. *United States*, 327 F.2d 208, 209 (5th Cir. 1964) ("My final word, ladies and gentlemen, is my sincere belief—and again I must say that defendant's counsel lead you to believe that I don't believe this story, that I am here because I have a job to do—but I believe this man is guilty of the crime charged or I would not be standing here right now prosecuting him. . . ."); *Henderson* v. *United States*, 218 F.2d 14, 19 (6th Cir.), *cert. denied*, 349 U.S. 920 (1955) ("I am going [to prosecute] . . . if I believe a man guilty. And if I don't believe he is guilty, no one is going to make me . . . prosecute him. . . ."); *United States* v. *Battiato*, *supra* at 719 ("If I, in my own mind, thought for one minute that these defendants were not parties to this case I certainly would not have the courage to stand up here and argue before you that they were guilty. It is never our intention to prosecute and try innocent men.")

All of these relied to some extent on the justifying effect of provocation, which we have said we do not recognize as automatically absolving the prosecutor.

We have found no case reversing for a statement of as marginal an impropriety as that here considered, whether or not provocation was present.

secutor's turning off the court's inquiry with a quasi-humorous admission, in answer to a question whether the prosecutor had been a witness and injected himself into his argument, that he had indeed asked a few leading questions. While the prosecutor's answer was clearly not responsive, we do not understand from oral argument that it was devious or calculated to mislead, there having been a superficial response accepted as such at that point. In any event it is clear both that the court did not recall the precise language which the prosecutor had used and that counsel did not feel it important enough to have such language read back. There is an obligation on counsel to make a reasonable effort to see to it that the court has before it the facts on which a requested ruling is predicated. *Cf. Corley* v. *United States,* 365 F.2d 884, 885 (D.C. Cir. 1966); *Camps* v. *New York City Transit Authority,* 261 F.2d 320, 323 (2d Cir. 1958). Had this been done, the court, even if it is likely that a mistrial would not have been granted, could have taken pains to devise a proper instruction. For this was not such an egregious comment as to be incurable. As it was, the charge was not given until the following day. The court did include a general instruction that only the evidence must be considered. No special requests were made on this point and no objections taken.

For these reasons we deem this error harmless within the meaning of Fed. R. Crim. P. 52(a).

## OTHER ALLEGED ERRORS

Two other asserted errors related to the fact that Baron was named in the indictment as a co-conspirator but not a defendant. The first is that this form of the indictment stemmed from improper prosecutorial influence on the grand jury. The second is that in the course of trial the court went out of its way to say that the government had the privilege not to indict a co-conspirator and in so doing

undercut defense efforts to impeach Baron's "inherently suspect testimony".

The first point is based solely on pre-grand jury promises by the prosecutor to Baron that he would not be indicted if he testified. Testimony from an accomplice in a criminal conspiracy is often a *sine qua non* for effective prosecution. *Hoffa* v. *United States,* 385 U.S. 293, 311 (1966). Such testimony will often not be available in the absence of a prosecutor's commitment to grant immunity from prosecution for the criminal acts which are the subject of such testimony. Whether or not a promise of immunity from indictment is technically within the prosecutor's unfettered power to implement, *cf. United States* v. *Cox,* 342 F.2d 167 (5th Cir. 1965), *cert. denied,* 381 U.S. 935, and Fed. R. Crim. P. 48(a), it is highly improbable that a grand jury, on understanding the circumstances resulting in Baron's testimony before it, would indict him. This is entirely proper. Here there is no suggestion of anything more, such as participation by the prosecutor in the deliberations of the grand jury which occurred in *United States* v. *Wells,* 163 Fed. 313 (9th Cir. 1908). Nor have appellants cited any authority requiring that Baron's designation in the indictment as a "coconspirator but not as a defendant" be struck under the circumstances of this case.[8]

Appellants' second contention, that the court erred in twice interjecting the comment in the course of cross-examination about the promise that Baron would not be indicted if he testified to the grand jury, that it was the government's privilege not to indict a co-conspirator as a defendant, is no more substantial. Not only was this a correct statement of the law, *Cox, supra,* but defense counsel made

[8] Had the district court granted the request and stricken these words, we do not see how appellants' position would have been improved. The facts surrounding Baron's testimony would necessarily be the battleground of the case.

no objection to the first *sua sponte* comment by the court nor to the same instruction in the final charge. The impeaching effect of the promise of immunity from indictment was not only fully argued at trial but overargued when counsel said "He is not going to be found guilty of anything". The court's charge contained standard provisions both as to assessing credibility in general and as to scrutinizing the testimony of an accomplice with great care. Nothing more was requested. We see no error.

Appellants' final argument is that motions for judgments of acquittal on the substantive counts were improperly denied because of a failure of any evidence to establish an "attempt" to commit a crime of violence. Both sides agree, however, that the imposition of concurrent sentences on both the conspiracy count and the substantive counts would require decision on this issue only in the event of a new trial.

*Affirmed.*

## Appendix B

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

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No. 7126.

RAYMOND PATRIARCA,
DEFENDANT, APPELLANT,

*v.*

UNITED STATES OF AMERICA,
APPELLEE.

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### JUDGMENT

October 14, 1968

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court:

(s) ROGER A. STINCHFIELD, *Clerk.*

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 7127.

RONALD J. CASSESSO,
DEFENDANT, APPELLANT,

*v.*

UNITED STATES OF AMERICA,
APPELLEE.

## JUDGMENT

October 14, 1968

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court:

(s) ROGER A. STINCHFIELD, *Clerk.*

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

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No. 7128.

HENRY TAMELEO,
DEFENDANT, APPELLANT,

*v.*

UNITED STATES OF AMERICA,
APPELLEE.

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## JUDGMENT

October 14, 1968

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court:

(s) ROGER A. STINCHFIELD, *Clerk.*